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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

RALPH M. RENTZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED.

Whether the conviction of the petitioner, Ralph M. Rentz, for conspiring to submit, and aiding and abetting the submission of false financial statements in violation of 18 U.S.C. §§2, 371 and 1014 should be reversed inasmuch as under either the test for constitutional error ennunciated in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824(1967) or the test for non-constitutional error stated in Hamling v. United States, 418 U.S. 87, 94 S.Ct. 287 (1974), the petitioner's conviction was impermissibly premised on an adaptation of the so-called "willful blindness" instruction that omitted the crucial element requiring an awareness of the "high probability" of the existence of false information and where the only information actually signed and submitted by the petitioner, as an outside certified public accountant, came from the petitioner's corporate client, was not the result of any audit by the petitioner, and clearly bore the appropriate disclaimer to prevent misinterpretation, that is, that the information was not produced by audit or verification so that the petitioner could

not express an opinion as to the financial information, all in accordance with the then-existing regulations of the California State Board of Accountancy.

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PETITION FOR WRIT OF CERTIORARI.

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Petitioner Ralph M. Rentz respectfully prays that a Writ of Certiorari be issued to review the Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit filed on October 7, 1982. That Opinion affirmed the petitioner's conviction for conspiring to submit and aiding and abetting the submission of false financial statements to the Chartered Bank of London, relative to Small Business Administration-Guaranteed loan, in violation of 18 U.S.C. §§2, 371 and 1014.

OPINION BELOW.

The Memorandum Opinion of the Court of Appeals of which petitioner seeks review

is unpublished; however, a copy is attached to the appendix that is being filed with this petition.

JURISDICTION.

The Court of Appeals' Memorandum Opinion was filed on October 7, 1982. On October 21, 1982, petitioner timely filed a petition in the Court of Appeals for Rehearing with the respect to the Court of Appeals' Memorandum Opinion. Thereafter, on December 3, 1982, the Court of Appeals issued an order denying petitioner's Petition for Rehearing. This petition is being filed within the time permitted by 28 U.S.C. §2101. This Court has jurisdiction to review the Court of Appeals' decision by Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED.

The Constitutional Provision involved is Due Process Clause, U.S. Const. Amend. 5 (Appendix B).

STATEMENT OF THE CASE.

Petitioner Rentz is a certified public accountant. From 1974 to 1977, Rentz was retained as an outside certified public accountant on behalf of California Custom Vinyl Corporation ("CCV"), an entity controlled by Grant Meeks. In the District Court, Rentz was charged with and convicted

with Meeks to submit and aiding and abetting the submission of false financial statements regarding CCV's application for a Small Business Administration-Guaranteed loan to the Chartered Bank of London.

At trial, Meeks testified as a "cooperating" government witness, after having pled guilty to one count of the indictment in return for the government's agreement to dismiss the other count against him. Meeks admitted at trial that he made up certain sales figures in order to convince the bank and SBA that CCV was showing a profit when, in fact, according to Meeks, CCV was showing a loss.

As to Rentz, the issue at trial was whether Rentz knew that Meeks had falsified the CCV financial materials and whether, knowing that the materials were false, nevertheless helped Meeks prepare the materials and submit them to the bank and the SBA.

Before Meeks had ever met Rentz, Meeks admitted that he submitted false financial information to Union Bank in order to obtain another, earlier SBA-Guaranteed loan for CCV. In addition, Meeks admitted that during the course of CCV's financial problems, he had repeatedly lied to other persons and

institutions regarding the financial status of CCV.

Noteworthy, moreover, is Meeks' testimony that, although Rentz helped him prepare certain of the unaudited financial statements in question, it was Meeks who had supplied the CCV sales figures and that it was Meeks who had "made them up." Furthermore, Meeks testified he had no specific recollection of ever informing Rentz that the figures supplied by Meeks were incorrect.

The evidence at trial clearly showed that only one item, a CCV balance sheet for the year ending September, 1975, was actually prepared and signed by Rentz, and that this item clearly contained a disclaimer, to prevent misinterpretation on the part of the Bank or the SBA. This disclaimer was in accordance with the then-existing regulations of the California State Board of Accountancy and stated:

> "These statements were produced without audit or verification and I cannot express an opinion on the above statements or schedules."

Other witnesses at the trial included Lawrence Hagerman, an SBA financial investigator, who testified that after the SBA guaranteed loan went into default, Rentz

was at all times cooperative and open with Hagerman and located all documents requested by the agent in his investigation. Also, Rentz's accounting partner, William Borberly, testified that in 1975 and 1976 he did intensive bookkeeping work for CCV at Rentz's request. Borberly stated that when he first began this task, CCV's books were in terrible condition. Of import is Borberly's testimony that Rentz was not a competent accountant with regard to the preparation of financial statements or with regard to tax returns. Borberly stated that the information regarding CCV's sales figures came from a listing of sales invoices which Rentz had received from Meeks. Although Meeks subsequently informed Borberly that CCV had actually shown a loss for 1975, rather than a profit as was indicated on the CCV financial materials, the prosecution was unsuccessful at trial in its efforts to establish that Borberly had told Rentz about the 1975 CCV losses. In fact, Borberly stated that Meeks had furnished Rentz with a stack of sales invoices and had represented the invoices as part of the sales for 1975. In addition, Borberly testified that Meeks supplemented these statements with oral figures and that Borberly, based upon what he knew of the CCV books, did not have any

reason to doubt the sales figures. Borberly also admitted that not only was he not suspicious of the sales figures reported by Meeks, but that he had every reason to believe that the figures were correct, based upon the increased activity that he saw at CCV headquarters.

When asked at trial if it was customary for an accountant to accept sales figures given to him by a client, Borberly responded that, in the case of a non-certified audit. that it was. Borberly stated that the only way to verify the sales figures submitted by a client would be through a certified audit. In such an audit, an accountant confirms the receivables and assets by sending letters to clients and verifies inventory by a physical count and also reconciles bank accounts. Borberly testified that because of the inordinate time and expense required for a certified audit, few small businesses ever request or require such audits. Borberly also testified that it was not unusual for a business to seek bank financing at a time of increased sales, inasmuch as it is precisely when sales orders are booming that that a company needs financing in order to meet the costs of increased production.

John Greenwood, a loan officer for the Chartered Bank of London who recommended the CCV loan application, testified that he knew that the one financial item prepared by Rentz had been produced without audit or verification and that he considered this financial data to be merely a "complication", that is, Greenwood understood that the statement merely reflected a presentation of accounting data in proper form and that the data had been given to the accountant by CCV. Specifically, Greenwood testified that he looked only to Meeks and another CCV official as warranting the accuracy of the financial statements and that he was aware that the one item prepared by Rentz was based to some extent on oral information given Rentz by Meeks.

Greenwood testified that at no time did Rentz ever vouch for the accuracy of the figures contained in the financial statements; nor did Greenwood ever look for such verification.

Finally, John Buckley, a professor of accounting called by the government as an expert witness, acknowledged that the one item signed by Meeks did not even rise to the level of an audited statement, and that even

as to audited statements, there is a marked difference between a certified audit and an uncertified audit. With respect to a certified audit, Buckley acknowledged that an accountant has a duty to "certify and authenticate" the figures that appear in the statements, whereas, with respect to uncertified audits, the accountant's responsibility is "limited representations that management makes."

Rentz submits that the evidence at trial was insufficient to warrant the District Court's "willful blindness" instruction to the jury. Moreover, the "willful blindness" instruction given by the District Court and upheld by the Court of Appeals was totally deficient,[1/] in that it failed to state that the jury must find Rentz was "aware of the high probability" that the fact in question was true, as required by the Court of Appeals own decision in United States v. Valle Valdez, 554 F.2d 911, 914 (9th Cir. 1977).

1/ The "willful blindness" instruction was as follows: "The element of knowledge may be satisfied from proof beyond reasonable doubt that a defendant deliberately closed his eyes to what would have otherwise been obvious to him. A finding beyond reasonable doubt of a conscious purpose to avoid

Because the "willful blindness" instruction should not have been given at all and because, as given, it was defective, Rentz's conviction must be reversed, whether this Court applies the constitutional standard that the error created by the instruction was harmless beyond a reasonable doubt, or the non-constitutional standard that it is more probable than not that the error did not materially affect the jury's verdict. The Court of Appeals' Memorandum Opinion in affirming Rentz's conviction was and is in error.

REASONS FOR GRANTING THE WRIT

1. The Evidence Was Insufficient To Warrant The "Willful Blindness" Instruction And The Giving Of This Instruction Violated The Petitioner's Rights Under The Fifth Amendment's Due Process Clause.

Rentz's conviction was based upon a "willfull blindness" instruction to the effect

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1/ continued
enlightment could permit an inference of knowledge. Stated another way, a defendant's knowledge or a fact may be inferred from willful blindness to the existence of the fact. It is entirely up to you as to whether you find beyond reasonable doubt any deliberate closing of the eyes, and the

that the jury could infer Rentz's guilty knowledge by proof that he deliberately closed his eyes to what otherwise would have been obvious to him. This instruction was constitutional error because it permitted the jury to convict Rentz without finding beyond a reasonable doubt that Rentz was involved in the verification or control of the financial figures given to him by Meeks. It is submitted that, on the basis of "willful blindness" an accountant should only be criminally responsible for conspiring to submit and aiding and abetting the submission of false financial information when he is involved in the verification, control, or supply of the financial data. To hold otherwise would result in a constitutionally impermissible deprivation of an accountant's Fifth Amendment due process rights, i.e., a conviction without finding a necessary element of the criminal offense beyond a reasonable doubt. In Chapman v. California, 386 U.S. 18, 87 S. Ct. 824 (1967) this Court held that

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1/ continued
inference is to be drawn from any such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfullness of knowledge.

before a federal constitutional error can be held harmless, the appellate court "must be able to declare a belief that it was harmless beyond a reasonable doubt." In the Ninth Circuit's opinion in United States v. Valle-Valdez, 554 F.2d 911, 915 (9th Cir.1977), the Court of Appeals in citing this Court's opinion in Moore v. United States, 429 U.S. 20, 97 S. Ct. 29 (1976) and In re Winship, 397 U.S. 358, 90 S. Ct. 1068(1970), recognized that errors in jury instructions can violate the Fifth Amendment's due process clause inasmuch as such error can permit a jury to convict without the requisite finding beyond a reasonable doubt that all elements of a criminal offense have occurred. See also, United States v. Rea, 532 F.2d 147 (9th Cir. 1976); United States v. Duhart, 496 F.2d 941 (9th Cir.), cert. denied, 419 U.S. 967, 95 S. Ct. 230 (1974).

In the instant case, however, the Court of Appeals upheld the "willful blindness" instruction and Rentz's conviction, notwithstanding the fact that, as an outside certified public accountant, Rentz had merely acted as a conduit with respect to the financial data given to him by his client.

In its Memorandum Opinion, the Court of

Appeals did not address the fact that Rentz had not performed any auditing function for CCV whether or not certified. Indeed, the Court of Appeals confused the limited work performed by Rentz with an actual audit. In the words of the Court of Appeals:

> "We cannot and do not distinguish between certified and uncertified audits for application of the willful blindness doctrine, i.e., for the purpose of determining whether defendant knew or deliberately chose not to learn that the financial statements were false." (Memorandum Opinion, page 10, Footnote 3).

It is clear that the Court of Appeals failed to realize that the one item signed and supplied by Rentz to the Chartered Bank of London was not based upon any audit - whether or not certified. Rather, Rentz supplied financial data given to him by his client with the express explanation that the information was produced without audit or verification and that he could not express an opinion as to the opinion he submitted.

The appellate court's acceptance of the "willful blindness" instruction in this case has imposed a duty subject to criminal liability, on a certified public accountant

where such a duty should not exist. In merely providing in the proper form financial information supplied by the client, an accountant exposes himself to criminal liability as if he had actually conducted an audit, notwithstanding the express disclaimer to all third-parties to whom the information may be given that the information was produced without audit or verification and that the accountant cannot express an opinion as to its accuracy. In other words, an accountant can no longer be a conduit of the financial information supplied solely by a client, because even with the express disclaimer, the accountant will be held to the test that he deliberately chose to learn the truth or accuracy of the financial statements.

It is submitted that the Court of Appeals constitutionally erred in not addressing, for the purpose of the "willful blindness" instruction, the difference between audits, where the accountants are involved with the verification, control, and supply of the financial data and instances such as this case, where the control and supply of the financial data is within the exclusive province of the client and, as to which, the accountant specifically states that the

information has not been subjected to an audit or verification.

Without distinguishing an audited from an unaudited statement, the Court of Appeals has eschewed the realities of an accountant's practice. With respect to an audit, an accountant represents and warrants the review and control of the accounting information and that the ultimate financial statements fairly represent a company's financial position and business operation. See, United States v. Weiner, 578 F.2d 757, 785 (9th Cir. 1978). In the instant case, Rentz's statement contained the appropriate disclaimer, which expressly noted that no such opinion could be given, precisely because the information had not been acquired by audit or verification.

Indeed, the distinction that the appellate court failed to draw was readily noted at trial by the government's own expert accountant, Professor John Buckley. As an expert in accounting procedure, Professor Buckley acknowledged that the one statement signed by Rentz did not even rise to the level of an audited statement, and that even as to audited statements, there is a marked difference between a certified audit and an

uncertified audit. As noted by Professor Buckley, with respect to a certified audit, the accountant has a duty to "certify and authenticate" the figures that appear in financial statements, whereas, with respect to uncertified audits, the accountant's responsibility is "limited to the representations that management makes."

Moreover, the one financial item signed and provided by Rentz with the written disclaimer, was completely in accordance with the then-existing regulations governing the professional duties of accountants. In this regard, the regulations of the California State Board of Accountancy pursuant to the California State Board of Accountancy pursuant to the California Business and Professions Code §§5010 and 5018, provided, inter alia, as follows:

> "Whenever a certified public accountant is associated with unaudited financial statements, he shall render a disclaimer of opinion which clearly indicates the fact that he has not audited the financial statements and accordingly does not express an opinion on them. . .
>
> * * *
>
> Because unaudited financial statements, by

> definition, have not been audited by the certified public accountant or public accountant (and he has no responsibility to apply any auditing procedures with respect thereto) he cannot be expected to have an opinion as to whether statements have been prepared in conformity with generally accepted accounting principles. . ."

Title 16, Professional and Vocational Regulations §58.2, Register 73.

By not differentiating between audited statements and unaudited compilations for the purpose of the "willful blindness" instruction, the Court of Appeals has placed the professional accountant in a quandary with respect to the regulations of his profession and has imposed upon the accountant a duty not contemplated by law - indeed, in this case, a duty clearly contrary to the then-existing regulations governing the accountant's practice. The Court of Appeals has effectively prohibited accountants from rendering unaudited statements for companies, especially small companies which cannot afford audits for singular purposes such as loan applications, even with the disclaimer required by professional regulations. Obviously, were an accountant to provide such an unaudited

compilation with the appropriate disclaimer, he would still face criminal liability in a trial in which the "willful blindness" instruction will be given. As a result, even though an accountant, as in this case, may strictly state, in accordance with his professional regulations, that the financial information did not result from an audit and that the accountant cannot express an opinion as to the accuracy or validity of the information, his guilt or innocence will be decided by a jury that has been instructed that an element of criminal knowledge may be satisfied from proof that he deliberately chose not to learn that which, in fact, he had no obligation to learn.

Clearly, the instant case is completely different from prior cases in which a "willful blindness" instruction has been approved. For example, in United States v. Weiner, supra, the defendants were auditors for Equity Funding Corporation for more than ten years. They were involved in the company's financial history "almost from its inception." United States v. Weiner, supra at 778. In the Weiner case, the evidence was overwhelming that the defendants prepared misleading consolidated financial statements, deliberately inflated an asset on a certified

statement, and deliberately concealed the true financial condition of the company. More importantly, of course, in the Weiner case is that the defendants were engaged as certified public auditors and were ostensibly producing audited financial statements. Indeed, the Weiner court noted that the defendants "had a duty to carefully investigate and review the financial information presented." Clearly, no such duty existed in this case, as there was no evidence presented that Rentz was involved in the certification, verification or control of any of the underlying financial data given to him by Meeks.

Further, in United States v. Natelli, 527 F.2d 311 (2nd. Cir.1975) the willful blindness instruction was properly given because the defendant, a partner in a national accounting firm, was involved with the supply of the financial data. In the words of the Court in the Natelli case, "the auditors rather than the company controlled the figures." Such a factual setting cannot be applied to the instant case, where Rentz received all of the sales figures from Meeks.

In both the Weiner and Natelli cases, it is clear that the defendant auditors were deeply involved in the verification, manufacture, and control of false data. In such

cases, accountants may justifiably be convicted if they are "willfully blind" to errors that they assisted in creating and could certainly have discovered.

With respect to Rentz, however, the instruction was not justified because Rentz was not at all involved in the verification of the sales figures that Meeks supplied him. Rentz was not asked to, nor was he expected to, verify the information. Further, Rentz never supplied or controlled the financial data supplied to him by Meeks.

The result in this case is that the due process clause has been rendered meaningless for Rentz. Indeed, this case has resulted in a theory of criminal liability less strict than that imposed upon accountants in civil litigation. As an illustration, in Ernst & Ernst v. Hochfelder, 425 U.S. 185, 96 S. Ct. 1375(1976), this Court held "that the scienter to sustain a civil action against accountants who actually conduct audits requires "the intent to deceive, manipulate, or defraud." i.e., negligence alone is not sufficient. While Rentz may well have been negligent in this case, his conduct was not criminal and his conviction is most assuredly based upon an impermissible deprivation of due process.

2. Even If The "Willful Blindness" Instruction In This Case Is Considered To Have Resulted In A Non-constitutional Error, The Writ Should Issue Because The Court Of Appeals Has Departed From Its Prior Decisions Regarding The Requisite Content Of The Instruction And Its Memorandum Opinion Is In Conflict With The Decisions Of Other Circuits.

Even if this Court were to view the "willful blindness" instruction in this case as a non-constitutional error so as to invoke the more-probable-than-not standard rather than the beyond-a-reasonable-doubt standard (compare Hamling v. United States, supra, and Chapman v. California, supra) this petition should be granted, because the Court of Appeals has departed from its own prior decisions regarding the content of the instruction and has rendered an opinion in conflict with the decisions of other circuits.

The instruction in this case (See Footnote 1/) clearly fails to state that the

jury must find that Rentz was "aware of the high probability" that the fact in question was true, i.e. that the financial data given him by Meeks was false. By upholding the District Court's instruction as given, the Court of Appeals has clearly departed from its prior decisions which mandate that to sustain a conviction, the "willful blindness" instruction must provide for a finding of an awareness of the high probability of the criminal element. Indeed, in United States v. Valle-Valdez, supra, the Ninth Circuit noted that it was unnecessary to decide whether the error in that "willful blindness" instruction was constitutional or non-constitutional. The court held that it was an error because it failed to add that a defendant's conscious purpose in avoiding to learn the truth is culpable only if the jury also finds beyond a reasonable doubt that the defendant was aware of the high probability of the facts sought to be established by the prosecution. As noted by the Ninth Circuit in Valle-Valdez:

> "The error or deficiency lies in the instruction's failure to add that the defendant's 'conscious purpose to avoid

learning the truth' is culpable only if the jury also finds beyond a reasonable doubt that he was aware of the high probability that the vehicle carried contraband. A deliberate avoidance of knowledge is culpable only when coupled with a subjective awareness of high probability.

***

In the present case, there is no need to resolve any inconsistency, if there is one, regarding the proper harmless error standard. Given the facts of this case, application of either the probability or the reasonable probability standard results in reversal. Our review of the record convinces us that the erroneous jury instruction probably materially affected the verdict. Necessarily, therefore, there is a reasonable possibility that it had such an impact."

United States v. Valle-Valdez, supra, 554 F.2d at 914, 917.

Prior to the instant case, the Ninth Circuit's rulings consistently held that the "willful blindness" instruction must contain the admonition that the jury find an awareness on the part of the defendant of the high probability of the fact in

question. See, e.g., United States v. Jewell, 532 F.2d 697 (9th Cir. 1976); United States v. McDonald, 576 F.2d 1350 (9th Cir. 1978); see also, United States v. Price, 623 F.2d 587 (9th Cir. 1980).

The Court of Appeals in this case not only departs from earlier Ninth Circuit decisions, it conflicts with the decision of other circuits. In this regard, the Second Circuit adopted the Ninth Circuit's reasoning in the Valle-Valdez case in its decision in United States v. Morales, 577 F.2d 769, 774 (2nd Cir. 1978) in holding that:

> ". . . the trial judge should at least have balanced its instruction [conscious purpose to avoid enlightment] by advising the jury that unless it found that appellant had been 'aware of a high probability' . . . it should acquit."

More recently, the Third Circuit has held in United States v. Mohabir, 624 F.2d 1140, 1154 (3rd Cir. 1980) that an inference of knowledge can only be drawn from "willful blindness" if a jury finds an awareness of high probability of fraud.

Other authorities have also insisted that criminal knowledge may be established only

if a person is aware of the high probability of the existence of the fact in question. See, e.g., Model Penal Code §2.02(7), quoted in 10 Uniform Laws Annotated (West 1974) and see Williams, Criminal Law (London, Steven & Sons 2nd 1961), at 159 where it is noted:

> "A court can properly find willful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted . . . to be able to deny knowledge. This, and this alone, is willful blindness. It requires in effect of finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of willful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge." (Emphasis added.)

The requirement that the "willful blindness" instruction contained the "high probability" language must remain a sine qua non in order to limit what otherwise could be an erosion of the traditional require-

ment of mens rea. Without the safeguard of this language there is a clear danger, as in this case, that a person will be convicted for actions amounting to only civil negligence.

CONCLUSION

For the reasons expressed, it is expressly submitted that this Petition be granted.

Dated: January 27, 1983

Respectfully submitted,

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